

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS IVAN GOLBA,

Defendant-Appellant.

FOR PUBLICATION

January 16, 2007

9:05 a.m.

No. 262261

Berrien Circuit Court

LC No. 2003-401652-FH

Official Reported Version

Before: O'Connell, P.J., and White and Markey, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent. I am unable to agree that defendant was properly required to register under the Sex Offenders Registration Act (SORA). The offense of which defendant was convicted—unauthorized access to computers, MCL 752.795—is not a listed offense. Nor does it fall within the then-applicable catchall provision of MCL 28.722(e)(x).¹

The jury failed to convict defendant of possession of child sexually abusive material. I do not agree that MCL 28.722(e)(x) contemplates that the court can conclude on the basis of the evidence presented that a defendant committed an offense of which the jury failed to convict him. Although I agree with the majority that a mistrial because of a hung jury does not constitute an acquittal, it also does not constitute a conviction, and the prosecution's remedy is a retrial if it seeks to require registration under the SORA.

Regarding the offense of which defendant was convicted, unauthorized access to computers, the offense does not by its nature constitute a sexual offense. Further, unlike the situation in *People v Meyers*, 250 Mich App 637; 649 NW2d 123 (2002), there was evidence in this case to support that the offense was committed in a manner that had nothing to do with a sexual offense: defendant admitted that he allowed students and another teacher to use his user name and password, which was contrary to the computer use policy, and that he asked the student witness to install a file-sharing program on his computer. While there was testimony from which one could conclude that the offense was committed in a fashion that did involve

¹ This was the provision applicable at the time defendant was tried. This catchall provision is now found at MCL 28.722(e)(xi).

sexual aspects, it is impossible to determine on which basis the jury concluded that the offense had been committed, especially when the jury was unable to reach agreement on the other charge. Under these circumstances, I am unable to agree that defendant was convicted of an offense that by its nature constitutes a sexual offense and must conclude that the court erred in determining that defendant is required to register under the SORA.

/s/ Helene N. White